APPENDIX A

Mexican Legislation

Divorce Law of the State of Chihuahua, Mexico

Article 22. The judge competent to take cognizance of a contested divorce is the one of the place of residence of the plaintiff; and to take cognizance of the one by mutual consent, the one of the residence of either of the spouses.

Article 23. Competence may also be fixed by express or tacit submission. Express submission exists when the parties concerned renounce clearly and conclusively that forum which the law accords to them, and designate with all precision the judge to whom they submit. Tacit submission exists by the fact that the plaintiff files his complaint, or by the fact that the defendant, after having been summoned in proper form, does not timely raise the lack of competence, or, after having raised it, desists therefrom.

Article 24. Residence for purposes of article 22 of the present law shall be proved by the respective certificates of the municipal register of the place.

APPENDIX B

Opinion and Judgment of the Supreme Court of New York County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Annulment Action

LEWIS S. ROSENSTIEL, *Plaintiff*,

–against–

SUSAN L. ROSENSTIEL, *Defendant*.

(New York County Clerk's Index No. 30758/1962)

Injunction Action

SUSAN L. ROSENSTIEL, *Plaintiff*,

–against–

LEWIS S. ROSENSTIEL, *Defendant*.

(New York County Clerk's Index No. 31198/1961)

(Consolidated Action)

Decision of Greenberg, J.

GREENBERG, J.:

Plaintiff Lewis E. Rosenstiel has invoked the authority of this court to annul the marriage which he entered into on November 30, 1956, in the City and State of New York, with the defendant Susan L. Rosenstiel. This marriage, plaintiff contends, cannot be afforded the legal aegis of validity as a purported Mexican divorce dissolving defendant's prior marriage to one Felix E. Kaufmann must be rejected as a nullity under the laws of New York. The

defendant denies the invalidity of the Mexican divorce and affirmatively urges the complete defense of res judicata predicated upon an "incidente" proceeding instituted in 1962 in Mexico by one Samuel Goldsmith, who, defendant alleges, was in reality the plaintiff.

The issue, in essence, therefore, is the effect to be accorded the divorce decree of the Mexican court. The resolution of this issue, in its effect on the fortunes of the defendant and its likely application to others similarly situated, requires the court to approach the disposition with caution, and yet with due regard to its duty and the recognition it must give to the public policy of this State. The unfortunate result in relation to the individual defendant must yield to the law of this jurisdiction.

In limine it is well to dispose of certain preliminary matters made necessary by certain rulings during the trial.

1. A motion was made to strike certain testimony of the witness Benjamin Javits on the ground that it was improper when admitted and timely objection was taken by plaintiff, that other testimony was improperly admitted although no objection was taken thereto, and that other testimony which was proper when admitted was subsequently shown to be inadmissible. The court has authority to grant such a motion during, at the time of, and after the trial has been concluded. It would serve no useful purpose to detail this improperly admitted testimony in extenso since the court in the main sustained objection to the testimony of the witness Javits on the ground of attorney-client privilege. Defendant urged that the fact that plaintiff instituted an action against his former attorney, Benjamin Javits, for an accounting and other relief, the privilege was waived for all purposes and for all time. This is not the law (see Matison v. Matison, 95 N.Y.S. 2d 837, affd. 277 App. Div. 770). The exceptions sought to be engrafted upon the rule of attorney-client privilege by the defendant are without legal force and if accepted would

in effect destroy this privilege which has long been recognized and accepted in the law.

Matter of Stefano, 10 A.D. 2d 473, asserted by the defendant as completely supporting her position, is not remotely applicable here. In that case there was an issue as to whether a judgment obtained by an injured employee against a third party was really the result of a compromise arrived at without the consent of the employer's insurance carrier. Hearings were held before a referee on the contested issue and the attorneys representing the injured workman and a third party refused to answer questions relating to arrangements which had been made between them leading to the judgment. The court held that such conversations were not privilege. Said the court, at page 475:

> "We hold merely that conversations between adverse attorneys at pre-trial proceedings are open to inquiry by the board where they are pertinent, as they are here, to a substantial right."

The situation here is opposite. It is not communications between adverse attorneys which are sought to be protected but rather the confidential communications between a client and his attorney. The endeavor by defendant's attorneys to circumvent the rule by attempting in effect to try the issues between plaintiff and his former attorney embraced in the accounting action and thus remove the privileged matter, did not escape the scrutiny of the court.

2. Testimony regarding certain alleged improper acts in the "Goldsmith incidente" proceedings was not admitted on the ground that it would have no material effect on the outcome of the litigation. This testimony, as urged by the defendant, was sought to be introduced for the purpose of (a) showing a "consciousness of a weak case" and (b) tainting the credibility of witnesses for the plaintiff herein. Extensive discussion is unnecessary as it is quite obvious

that the proposition of law regarding fraudulent practices as espoused by the defendant has no application to the case at bar. This will be discussed more fully in relation to the merits of the defense of res judicata.

3. We come now to the defense of res judicata which was and is vigorously advanced as determinative of the instant litigation. On October 2, 1954, defendant's prior husband, Felix E. Kaufmann, obtained a decree of divorce from her in the First Civil Court of Bravos, Ciudad Juarez, Mexico. In 1962 one Samuel Goldsmith commenced an ex parte "incidente" proceeding which resulted in the granting of a decree on February 6, 1962, nullifying defendant's 1954 divorce. It is now contended under the defense of res judicata that the aforesaid Samuel Goldsmith was in fact the plaintiff herein, Lewis S. Rosenstiel. This allegation of course is denied by the plaintiff.

On June 7, 1962, when she learned of the nullification decree entered in the First Civil Court of Bravos, defendant Susan Rosenstiel filed a constitutional proceeding known as an "amparo" in the Mexican Federal Court. In that proceeding defendant claimed that the ex parte nullification order entered in the state court at the behest of Samuel Goldsmith was void, alleging among other things that it was entered without notice to her and in derogation of her rights of due process guaranteed by Mexican federal statutory and constitutional law. That court, on November 27, 1962, refused to grant the "amparo." The Court ruled that defendant had not instituted that proceeding within the prescribed time. She appealed from this adverse decision of the Second District Court to the Federal Court of Appeals for the Third Circuit, City of Saltillo, State of Coahuila, Mexico. The Federal Court of Appeals reversed the decision of the Second District Court and on May 10, 1963, granted the "amparo" and simultaneously remanded the file to the court below for appropriate action in accordance with the decision. The Second District Court there-

upon, and this appears from the May 28, 1963, decree, notified the state court of the Appellate Division and instructed it to the effect that the state court must incorporate the federal decision in its record.

Thereupon, the state court entered a resolution revoking the Goldsmith ex parte nullification and stated that accordingly, "the entire proceeding in the divorce proceeding is legal because brought by Mr. Felix Ernest Kaufmann against Mrs. Susan E. Kaufmann as well as a divorce judgment rendered on October 2, 1954, which was declared final on October 6, 1954" remained valid.

Thereafter and on February 4, 1964, the defendant, pursuant to leave granted by the court, served a supplemental answer alleging the defense of res judicata based upon the order entered in the First Civil Court of Bravos, Juarez, State of Chihuahua, Mexico, on May 28, 1963. A motion was made to strike this defense, plaintiff contending that since there had been no decision on the merits as to the validity or invalidity of the 1954 divorce decree, the defense of res judicata was legally insufficient. The court at Special Term (Hellman, J.) denied the motion to dismiss, holding that two issues of fact were involved: (a) was the Goldsmith who instituted the January, 1962 proceeding in reality the plaintiff; (b) was the final determination of the Mexican appellate court in May, 1963 a judicial determination on the merits of the issues raised by Goldsmith in the nullification proceeding or was it, as plaintiff contends, a vacatur based solely on the absence of notice to defendant of the institution of the proceeding so as to render the determination a procedural one only? Expert testimony was produced by the contending parties with respect to Mexican law and the effect of the decree of the Mexican appellate court.

Since the determination of foreign law is for the court, this issue was taken from the jury. The court on this issue

concludes as follows: (1) It is elementary that res judicata as a defense may be invoked only where the same parties and issues were before the court and there was a definitive determination of the contested issues on the merits. Citation of authority for this well-recognized principle would be a work of supererogation. It is sufficient to state that where the record is indefinite as to whether the merits bottomed the prior judgment it is not conclusive and hence res judicata as a defense must fall. Moreover, a judgment dismissing an action based upon a technicality is not a judgment upon the merits and hence cannot sustain a defense of res judicata. Based upon the expert testimony in the case and its own exhaustive search of the authorities, the decision of the Saltillo court or the decree entered pursuant to that decision by the First Civil Court of Bravos did not make any finding with respect to the validity of the divorce decree obtained by Felix Kaufmann against the defendant in 1954. All that the Saltillo court did was to reverse the decision of the lower federal court which refused to consider the "amparo" petition and to grant the "amparo"—thus determining that the acts complained of or the proceedings in the Goldsmith "incidente" action which resulted in the nullification of the divorce decree were unconstitutional. In essence, this decree set aside the previous nullification decision and permitted the divorce decree to stand as it was before the Goldsmith nullification proceedings were undertaken and this decision was predicated on the lack of notice to Mrs. Rosenstiel in the "incidente" proceeding. A complete search of the record fails to disclose that the appellate court examined the merits of the findings made by the "incidente" court. Moreover, it is crystal clear that there was no determination by any of the Mexican courts that the 1954 divorce was valid in New York under New York law as obviously it could not determine.

Additionally, the Saltillo court did not have the power under Mexican law to decide the issue of the validity of the

divorce on the merits even if such issue had been raised and thus any determination or finding by the Saltillo court with respect to defects in the divorce was immaterial to its decision and could not result in res judicata in this action. Under the provisions of the Mexican law regulating "amparo" as demonstrated by expert testimony, the scope of inquiry of an "amparo" court is limited to the acts complained of in the "amparo" petition. Thus its power was limited to a determination of the validity of the Goldsmith "incidente" proceedings.

It is the conclusion of this court that the "amparo" court could not have made under Mexican law any determination as to the validity of the 1954 divorce other than to set aside the nullification proceedings and leave the divorce decree in Mexico as it was before the nullification decree. Any findings which the Saltillo court might have made with respect to the defects in the divorce proceedings claimed by Goldsmith or found by the Chihuahua court which nullified the divorce were immaterial to its decision and could not operate as res judicata here.

If we should accept the decision of the Mexican court as a determination of the merits of the validity of the divorce under Mexican law and going a step further assuming that the plaintiff in this action was in fact Goldsmith in the Mexican proceeding, the decision of the Saltillo court nevertheless would not be res judicata since the validity of the divorce under New York law was not in issue, nor was it decided; and even if it had been litigated and decided, it would not be binding on this court.

It is obvious that assuming all of the facts to be as claimed by the defendant, all that he extracted from the decisions and judgments in the Goldsmith proceedings, including the subsequent "amparo" decisions and decrees entered therein, is an affirmation of the validity of the 1954 Mexican divorce according to Mexican law. Therefore, on the issue of res judicata the court holds with the plaintiff

and dismisses the defense on the facts and as a matter of law.

We return, therefore, to the principal issue in this case —should the divorce decree of the Mexican court in the case of Kaufmann v. Kaufmann (the defendant herein) be recognized in this jurisdiction? In mid-1954 the defendant and her first husband *agreed* in New York, where both had been domiciled since their marriage in 1945, to divorce each other. A New York attorney was engaged. (The defendant in this case claims that the attorney was engaged by her then husband, Kaufmann; Kaufmann in his deposition says that his then wife engaged the attorney; and the Mexican attorney, Mr. de la Torre, called to the stand by defendant, testified that he was retained by the New York attorney acting on behalf of the defendant in this case, the present Mrs. Rosenstiel.) Mr. de la Torre testified, without contradiction, that he was retained to effectuate the planned dissolution of the Kaufmann marriage; he, in turn, selected two resident State of Chihauhau attorneys, one of whom had been recommended by the other, to represent Mrs. Kaufmann and forwarded the necessary documents, including a power of attorney executed by Mrs. Kaufmann, to them. Financial compensation for the services was provided by Mr. de la Torre, for both Mexican attorneys resident in Mexico, who had received an all-inclusive fee from the New York attorney.

In view of section 51 of the Domestic Relations Law of the State of New York, the testimony of the witness da la Torre is recited in part to show the brazenness of the conception and the execution of the arrangement for the procuring of a Mexican divorce by the defendant.

> "The Witness: Well, Mr. Floria, a New York attorney, he got in touch with me in representation of Mrs. Kaufmann (the defendant Mrs. Rosenstiel) and told me that they were interested in securing a decree of divorce in Mexico before the Mexican courts and

that he was engaging me to supply the attorneys for the divorce, give him that service and supervise the divorce.

The Court: Did I understand you retained the attorney for the plaintiff at the request of Mr. Floria?

The Witness: That's right.

The Court: Who was the attorney for Mrs. Kaufmann?

The Witness: That's right.

The Court: And you also retained the attorney for the defendant in that case?

The Witness: Yes, because I am—yes, sir.

Q. You give advice to other lawyers, is that it?
A. That's correct.

Q. On Mexican law?
A. Yes, sir.

Q. Mr. de la Torre, are you a member of the New York Bar?
A. No, sir.

Q. Did you take care of the fee of Mr. Lopez and Mr. Trias (the former represented the defendant and the latter represented Mr. Kaufmann)?
A. Yes.

Q. In other words, Mr. Floria gave you enough money to take care of your own fee and their fees?
A. Correct, yes."

Mr. Kaufmann, who planned a trip to the western part of the United States, agreed to be present in Ciudad Juarez in order to obtain the divorce. As he had departed prior to the completion of all arrangements for the divorce, instructions informing him that a Mr. Trias in Ciudad Juarez had been retained as his attorney and that he was to appear at Mr. Trias' office on the morning of October 1, 1954,

were forwarded to him by mail. Immediately prior to the fixed date Mr. Kaufmann traveled to El Paso, Texas, and registered at the Del Camino Motel.

On the morning of October 1, 1954, Mr. Kaufmann drove by taxi to the International Bridge leading to Ciudad Juarez, walked across the bridge, and then proceeded to his appointment with Mr. Trias. Without any delay, Mr. Trias guided Mr. Kaufmann to what the latter has identified in his testimony as the courthouse. There Mr. Kaufmann was instructed and did sign "some kind of register". Pursuant to further directions, he swore to the accuracy of some document [the complaint], written in Spanish, and signed it, although, in fact, he was not aware of its contents. All of the discussions and transactions were conducted in Spanish, a language with which Mr. Kaufmann professed no familiarity. Within approximately one hour from his arrival in Mexico, Mr. Kaufmann returned to El Paso, Texas. Except for this one-hour presence to transact the foregoing, Mr. Kaufmann had never been in Ciudad Juarez, Mexico, nor has he returned at any subsequent time.

Of critical significance, and defendant does not deny this, at no time in his life did Mr. Kaufmann become a domiciliary of any part of Mexico.

On the following day, the Mexican lawyer, Heber Lopez, appeared on behalf of Mrs. Kaufmann, expressly submitted to the jurisdiction of the court, renounced all other jurisdictions, confessed to the allegations of the complaint and, too, requested the divorce decree. The decree was granted on October 2, 1954 and it is valid in Mexico.

Jurisdiction of the court rendering the decree constitutes the ultimate touchstone for the adoption or rejection of the foreign judgment as a part of the law of New York. "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile [citing cases]. The framers of the Constitution

were familiar with this jurisdictional pre-requisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it." (Williams v. North Carolina, 325 U.S. 226, 229.)

Domicile as the sine qua non requisite for jurisdiction to grant a divorce is rooted in the basic concept of social rights and obligations in the marital res. The marriage contract creates not only personal rights and obligations, but transcending these, there arises a social—the state's interest in the marriage. "The authority of a court to dissolve the marriage bond, therefore, must rest upon the authority of the state over the marriage, requiring that at least one of the parties be a domiciliary of this state * * *." (Senor v. Senor, 272 App. Div. 306, 310-311, affd. 297 N.Y. 800).

A divorce granted by a sister state, provided the requirements of procedural due process are met, is "entitled to a presumption of validity under the 'full faith and credit' provision of the Federal Constitution" (Rosenbaum v. Rosenbaum, 309 N.Y. 371, 375), and is subject to only very limited collateral attack (Johnson v. Muelberger, 340 U.S. 581).

> "However, we have never held that any such presumptive legality and validity must be accorded Mexican divorces—which are, of course, beyond the scope of 'full faith and credit'. [Cases cited] Judgments of course of foreign countries, we said in Martens v. Martens, 284 N.Y. 363, 365, 31 N.E. 2d 489, 490, 'differ from judgments of course of our sister States to which, by constitutional mandate, full faith and credit must be given. They must not contravene our public policy.' *Thus, under comity—as contrasted with full faith and credit—our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons, despite whatever*

allegations of jurisdiction may appear on the face of such foreign judgments. (Emphasis ours.)

"* * * It is therefore clear that the recognition of a foreign country judgment is far less certain, the judgment itself is far more assailable and vulnerable, than sister State judgments, and is subject to a test of policy. There is thus no significant basis for treating sister State and foreign country divorce judgments as identical in legal effect within this State." (Rosenbaum v. Rosenbaum, supra.)

Decisional precedents thus mandate a determination by this court of whether the Mexican court which rendered the Kaufmann divorce decree possessed jurisdiction over the marital res based on domicile.

The decree itself recites in relevant part that,

"* * * This court (Mexican) has jurisdiction to decide the present case according to article 22 and 24 of the Law of Divorce, because the plaintiff proved that he is registered in the municipal registry of this city in accordance with the law at the time that he started this suit, and in accordance with article 23 of the same law, because both parties submitted expressly to the jurisdiction of the undersigned judge."

The jurisdictional recital in the decree refers to the three articles of the Divorce Law of the State of Chihuahua which provide:

"Article 22. The judge competent to take cognizance of a contested divorce is the one of the place of residence of the plaintiff; and to take cognizance of the one by mutual consent, the one of the residence of either of the spouses.

"Article 23. Competence may also be fixed by express or tacit submission. Express submission exists

when the parties concerned renounce clearly and conclusively that forum which the law accords to them, and designate with all precision the judge to whom they submit. Tacit submission exists by the fact that the plaintiff files his complaint, or by the fact that the defendant, after having been summoned in proper form, does not timely raise the lack of competence, or, after having raised it, desists therefrom.

"Article 24. Residence for purposes of article 22 of the present law shall be proved by the respective certificates of the municipal register of the place."

In arriving at an understanding of the foregoing specific provisions of the Divorce Law of the State of Chihuahua, within the context of the fundamental concepts of the law of that State and of Mexico, this court is indebted to the expert witnesses from that country.

Contrary to our concept of the marital res and jurisdiction predicated upon domicile, submission of the parties to the power of the court constituted the essence and the source of jurisdiction to grant a divorce in the State of Chihuahua. Domicile is superfluous. A marriage may be dissolved by mutual consent, in which case a single petition is presented to the court, or by a "contested" divorce, which latter classification comprehends a divorce in which the defendant admits the allegations of the complaint and requests that the decree be granted. The domiciliary state's interest in the marital res upon which our law is based represents an alien concept to the law of the State of Chihuahua. The Divorce Law does not distinguish between "inhabitants" and "transients." Instead, any "requirement of residence" in the law more closely approaches our doctrine of venue and can be waived by "express" or "tacit submission".

Consonant with the Divorce Law of the State of Chihuahua, it cannot be gainsaid that the Kaufmann divorce decree rests upon a jurisdictional recital which *need not*

comprehend domicile; consonant with the undisputed facts of the Kaufmann divorce and the uncontroverted conclusions arising therefrom, it cannot be gainsaid that the Kaufmann divorce decree rests upon a jurisdictional recital which *does not* comprehend domicile.

Precedent and policy mandate the rejection of the Kaufmann decree in the State of New York. In Rosenbaum v. Rosenbaum (309 N.Y. 371) the defendant husband did not deny that he had "appeared in Mexico * * * solely for the purpose of signing divorce papers and not for the purpose of residing there" (id. at 374). Even though, in that case, the husband's Mexican petition alleged that he was a resident of Mexico, "and in that virtue you are thereby competent to hear and try my case," (id. at 379) the Court of Appeals declared, at 376, that the action was "a clear legal nullity under the allegations of plaintiff's complaint, and of no more validity than a so-called mail-order divorce". The Kaufmann divorce decree can be accorded no higher legal status.

Nor was the jurisdictional infirmity in the Kaufmann decree cured by the patently collusive arrangement to submit to the power of the State of Chihauhau and to renounce the authority of the state of the marital res, i.e., New York. The defendant and Mr. Kaufmann violated the express interdiction of section 51 of the Domestic Relations Law of New York which forbids any agreement between a husband and wife "to alter or dissolve a marriage". "They violated our statute embodying our public policy * * *. Their collusive agreement and conduct may not be the foundation for the creation of any rights (Caldwell v. Caldwell, 298 N.Y. 146, 150).

In a penetrating and well-considered opinion, Mr. Justice Coleman, in Wood v. Wood, 245 N.Y.S. 2d 800, reached the same conclusion. There the parties had entered into a separation agreement, both were domiciled in and residents of New York. The plaintiff there went by plane

from New York to Juarez in Chihuahua. The same day, or the next, she appeared in court with an attorney and filed a complaint against her husband asking for a divorce on the ground of incompatability of temperament—a recognized ground in Chihuahua. Immediately thereafter she returned to the United States. The defendant husband appeared by Mexican attorney, authorized to appear by virtue of a power of attorney mailed to that attorney from New York. The husband did not got to Chihuahua. The answer admitted the allegations of the complaint and thereupon a decree was entered.

Justice Coleman, in rejecting recognition to this decree, emphasized that before New York will recognize a divorce obtained by New York domiciliaries in another state (be it a sister state or a foreign state), that she must have had jurisdiction over the marital res, which jurisdiction must be based upon the domicile or bona fide residence of one of the parties.

In language pertinent here, the learned court said:

> "I think we may start with the premise that a court granting a decree of divorce must have jurisdiction over the controversy between the parties. Because of the nature of the case—involving marital status—jurisdiction must be based upon domicile (or its current equivalent—residence for a longer or shorter period of time). Unless one of the parties at least is domiciled in the divorcing state, the court, in our view, has no power to hear the merits of the controversy. This is so whether the court is that of a sister state or that of a foreign country (Williams v. North Carolina, 317 U.S. 287, Same v. Same, 325 U.S. 226; Caldwell v. Caldwell, 298 N.Y. 146, and Senor v. Senor, 272 App. Div. 306, affd. 297 N.Y. 800)."

Continuing, the court, in the Wood case, said further:

> "And it is equally clear that it is for us to decide whether there was domicile. There was no domicile

here, no residence or beginning of residence, of either party. Upon general principles, then, the divorce is invalid."

Defendant has attempted to distinguish the Wood case on the ground that Felix Kaufmann in the instant case satisfied the residence requirements of Chihuahua by obtaining a certificate of residence. In other words, it is contended that on such a state of facts the Chihuahua court obtained a stronger position upon which to predicate jurisdiction. There is no merit to this contention as it will be observed that there are no requirements in Chihuahua that the party appearing in person be a bona fide resident or domiciliary in order to obtain a divorce. The Divorce Law of the State of Chihuahua contains two alternative jurisdictional provisions. The divorce under challenge here was based upon both article 23 (submission by the parties) and articles 22 and 24 (residence of the plaintiff). It would seem that the appearance by one of the parties under article 23 is mere surplusage and makes no difference whatsoever between the kind of decree so obtained and a mail-order divorce (see Caldwell v. Caldwell, 298 N.Y. 146).

Articles 22 and 24 of the Divorce Law of Chihuahua authorize the court to exercise jurisdiction predicated upon the "residence" of at least one of the parties. "Residence", for the purpose of these articles, is defined as personal registration with the Municipal Clerk at the City Hall, the act of registration constituting a jurisdictional act which is recited in a divorce decree.

The testimony of this case has established that the obtaining of a certificate of residence is a mere formality with no prerequisite that the party be in Mexico for any length of time or to state any intention to become a resident. By the standards of Chihuahua the question of domicile was completely irrelevant and therefore the crucial issue is now before this court for decision. It was not adjudicated in the Mexican court and has no binding effect on this jurisdiction.

The situation is aptly summed up, to quote again from Mr. Justice Coleman's decision in the Wood case:

> "We do not question the power of the court (in Mexico) to take the position with regard to its own citizens and perhaps with respect to those whom it considers as being domiciled there. We do question the power when it concerns our citizens who either by mail or by personal appearance of one party in lieu of mail and by mail by the other party, asked to be treated as though they were citizens or domiciliaries of the foreign country and to have their marital status determined upon request alone."

Similarly, the Court of Appeals in Caldwell v. Caldwell, 298 N.Y. 148, which invalidated a Mexican mail-order divorce, said:

> "Domicile is the controlling factor. This is made abundantly clear in the following language of the majority opinion (Frankfurter, J.) in the second Williams v. North Carolina case, supra, 325 U.S., p. 229: 'Under our system of law jurisdictional power to grant a divorce—jurisdiction—strictly speaking—is founded on domicile' ".

The conclusion here is irresistible that the Mexican decree in Kaufmann v. Kaufmann has no validity in this jurisdiction and will therefore not be recognized.

At the end of the entire case the court withdrew the case from the consideration of the jury on the ground that while defendant in an annulment action is entitled to a jury trial as a matter of right on the issuable facts, there were no facts here for determination by the jury. Res judicata is an issue for determination by the court and such other issues as may appear in the case resolve themselves into questions of law. There was thus nothing for the jury to decide and accordingly it was discharged from further consideration of the case at the conclusion of the trial. Plaintiff moved for judgment. Defendant moved to

dismiss the complaint on grounds of legal insufficiency and other grounds and for judgment in her favor. The defendant urged upon the court's consideration the argument that by attacking the validity of his purported marriage to the defendant the plaintiff bears the burden of "proving the negatives". In his extensive argument counsel for the defendant has misconstrued the doctrine of "proof of negatives". What the defendant is saying is that the plaintiff must prove that the defendant and Kaufmann did not obtain another divorce after the Mexican divorce of 1954, that is, between 1954 and November 30, 1956, when she married plaintiff herein. We start with the clear facts that defendant married Kaufmann on January 12, 1945, in Reno, Nevada. Kaufmann is still living. These two facts are admitted in her answer and testimony; and further, we have the evidence by Kaufmann, through Kaufmann's deposition taken in 1963, that he was then living. Even if this court were to accept defendant's theory of proof of negatives, the only remotely possible issue is whether Felix and Susan Kaufmann might have obtained another divorce between October 2, 1954, and November 30, 1956. Even if such a remote possibility existed, it has been conclusively disputed by the testimony of Kaufmann taken in his deposition and read into evidence by the defendant as cross-examination and defendant on the stand did not dispute this part of Kaufmann's testimony. In fact, her "affidavit for license to marry Lewis Rosenstiel", which she put in evidence, states that her only divorce was the October 1954 Mexican divorce.

In any event, defendant having admitted such marriage and not having raised any issue as to its validity, cannot now at this late date be heard to question it.

The cases cited by the defendant dealing with negatives are not here pertinent and do not demonstrate an inadequacy in plaintiff's proof with respect to the situation as it existed before, during, and after the Kaufmann marriage. Unfortunately, counsel for the defendant quoted ex-

tensively from Surrogate Hildreth's opinion in Matter of Newin's Will, 213 N.Y.S. 2d 255 (Suffolk Co.); that case was cited as the authority which required plaintiff herein to prove every possible and conceivable fact imaginable before a court of law will declare a mariage null and void. The court was astounded to find that that case upon which so much reliance was placed by defendant's counsel was reversed by the Appellate Division (16 A.D. 2d 436) on the point in question and this reversal was affirmed by the Court of Appeals (12 N.Y. 2d 824). In fact, the Appellate Division in commenting upon the Surrogate's theory of the presumptions of validity of a marriage and legitimacy of issue adopted the words of Justice Cardozo to the effect that this theory of such presumption is a presumption "gone mad". Said the court:

> "The Surrogate has held that there was lack of satisfactory proof of the validity of the testator's first marriage. Such holding is an example of what is characterized in Matter of Findlay (supra, 253 N.Y. p. 13, 170 N.E. p. 475) as 'the presumption of legitimacy gone mad.'"
>
> * * *
>
> "We appreciate that the Surrogate was animated by the most laudable of motives in endeavoring to preserve as lawful the marriage of testator and Esther; but there is no alternative to the conclusion that that marriage was void * * *."

The other cases carry no greater force. Accordingly, the court directs judgment in favor of the plaintiff for the relief demanded in the complaint. Settle judgment which shall provide for a hearing with respect to alimony and counsel fee, which the court decrees in its discretion under the circumstances of this case that defendant is entitled to recover.

Dated, May 18, 1964.

APPENDIX C

Order and Opinions of the Appellate Division. First Department

ORDER OF THE APPELLATE DIVISION, APPEALED FROM

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of November, 1964.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,

" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" ELLIS J. STALEY, JR.,
Justices.

No. 7885

Annulment Action

LEWIS S. ROSENSTIEL, *Plaintiff-Respondent,*

vs.

SUSAN L. ROSENSTIEL, *Defendant-Appellant.*

Injunction Action

SUSAN L. ROSENSTIEL, *Plaintiff-Appellant,*

vs.

LEWIS S. ROSENSTIEL, *Defendant-Respondent.*

An appeal having been taken to this Court by Susan L. Rosenstiel, the Defendant-Appellant in the annulment action, from a judgment of the Supreme Court entered on

June 12, 1964, in New York County, upon a decision of the Court at a Special Term, Part XXII thereof (Greenberg, J.) insofar as it granted the plaintiff-respondent Lewis S. Rosenstiel, an annulment and dismissed appellant's action for a permanent injunction; and said appeal having been argued by Mr. Louis Nizer, of counsel for the Defendant-Appellant Susan L. Rosenstiel, and by Roy M. Cohn, of counsel for the plaintiff-respondent Lewis S. Rosenstiel, and due deliberation having been had thereon, and upon the "Opinion" of the unanimous Court by Presiding Justice Botein, and the concurring "Opinions" of Mr. Justice Valente and Mr. Justice McNally, all filed herein on October 21, 1964, it is unanimously

ORDERED, that the judgment insofar as appealed from, be and the same hereby is reversed on the law, and on the facts, without costs, and the judgment of annulment appealed from, be and the same hereby is vacated, and plaintiff-respondent's cause of action for an annulment, be and the same hereby is—on the law and facts—dismissed; and it is further

ORDERED that defendant-appellant's action for an injunction which the judgment appealed from dismissed—be and it hereby is reinstated.

ENTER,

B. B.

OPINIONS OF APPELLATE DIVISION

BOTEIN, *P.J.*:

Plaintiff husband and defendant wife were married in New York on November 30, 1956. On April 26, 1962 plaintiff brought an action to annul the marriage, alleging that on January 12, 1945 defendant married one Felix Ernest Kaufmann and remains married to him. In answer, defendant pleaded a decree of divorce obtained by Kaufmann on October 2, 1954 in the First Civil Court, District of

Bravos, City of Juarez, State of Chihuahua, Mexico, on grounds of "ill treatment and incompatibility of characters." Consolidated with the annulment action is an injunction action by defendant to restrain plaintiff from suing her for matrimonial relief in any jurisdiction other than New York. After submission of all of the evidence the trial court held that there was "not any material issue of fact for this jury to decide"; and dismissed the jury. The court concluded that the Mexican decree had been rendered by a tribunal without jurisdiction, declined therefore to recognize it, and entered a judgment, from which defendant takes this appeal, granting the requested annulment and dismissing the injunction action.

The validity of the questioned decree under Mexican law is not disputed. Recognition has been refused primarily on the ground that neither Kaufmann nor defendant had been domiciled in the State of Chihuahua, and, in the view of the trial court, domicile is "the sine qua non requisite for jurisdiction to grant a divorce." Undeniably Kaufmann and defendant were not Mexican domiciliaries as the concept of domicile is generally understood. On the same day that Kaufmann entered Mexico he returned to the United States, in the interim presenting his divorce petition to the court in the City of Juarez together with a certificate issued by the office of the municipal president showing that he was registered in the official book of residents of the city. On the following day defendant appeared in the suit by an attorney, who on her behalf submitted to the court's jurisdiction and admitted the allegations of the complaint. The decree was also entered on the same day.

As stated in *Drew* v. *Hobby* (123 F. Supp. 245, 247), "it was long ago decided in New York that lack of domicile is not necessarily a bar to the recognition of a foreign divorce." As authority for the statement the court correctly cited *Gould* v. *Gould* (235 N. Y. 14, 29), where the Court of Appeals, discussing divorce judgments of the

courts of France, had said: "Even though it be assumed that we are not required because of the absence of domicile to give effect to their judgments, we are not prohibited from doing so where recognition, in conformity to the principle of comity, would not offend our public policy."*

The fact pattern in *Gould* v. *Gould* is of course remote from that before us. The Goulds, though not domiciled in France, had resided there for years and the divorce was granted for adultery. But the Court of Appeals was quite aware of the possible impact of its decision, expressly leaving open for future determination whether a decree would contravene our policy if based on a transitory presence in the rendering jurisdiction or on grounds other than adultery (235 N. Y. at 29, 30). New York policy on such questions was thereafter expounded in *Glaser* v. *Glaser* (276 N. Y. 296), in which the wife charged expressly "that the main purpose of her husband in going to the foreign state was to procure the divorce" (p. 299); and this policy was summed up in *Matter of Rhinelander* (290 N. Y. 31, 36, 37) thus: "It is no part of the public policy of this State to refuse recognition to divorce decrees of foreign states when rendered on the appearance of both parties, even when the parties go from this State to the foreign state for the purpose of obtaining the decree and do obtain it on grounds not recognized here." Since it is common knowledge that the parties, with rare exceptions, return here, the quotation indicates rather plainly New York's indifference, in the juridical sense, as to whether they achieved domiciliary status in the foreign state, if both appeared there.

Accordingly, domicile as distinguished from a visit has been held to be a jurisdictional requisite where but one spouse enters the foreign country and proceeds ex parte

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* The opinion by CONWAY, *J.*, dissenting, in *Matter of Rathscheck* (300 N. Y. 346, 355) shows clearly that he did not intend his remarks about domicile in *Caldwell* v. *Caldwell* (298 N. Y. 146, 149) to be taken as a departure from the doctrine of *Gould* v. *Gould*.

(*Imbrioscia* v. *Quayle,* 278 App. Div. 144, aff'd 303 N. Y. 841; *Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371); and recognition will be refused the "mail-order divorce," so alien to our legal tradition, where neither spouse enters the foreign country (*Caldwell* v. *Caldwell,* 298 N. Y. 146, 148). In the last cited case the court noted: "Neither the defendant nor his wife visited Mexico. The decree contains no recital that either party to the action was even physically present or domiciled in Mexico." Our courts, however, without inquiring into domicile, have frequently recognized Mexican decrees if, as here, the petitioning spouse has appeared in person and the answering spouse in person or by attorney (*Leviton* v. *Leviton,* 6 N. Y. S. 2d 535, mod. 254 App. Div. 670; *Laff* v. *Laff,* 5 Misc. 2d 554, SCILEPPI, *J.*, aff'd 4 A. D. 2d 874; *Heine* v. *Heine,* 231 N. Y. S. 2d 239, aff'd 19 A. D. 2d 695; *Bush* v. *Bush,* 229 N. Y. S. 2d 904, mod. 18 A. D. 2d 700; *Matter of Fleischer,* 192 Misc. 777; *Bowen* v. *Bowen,* 22 Misc. 2d 496; *Weibel* v. *Weibel,* 37 Misc. 2d 162; *Mountain* v. *Mountain,* 109 N. Y. S. 2d 828; *Caswell* v. *Caswell,* 111 N. Y. S. 2d 875; *Costi* v. *Costi,* 133 N. Y. S. 2d 447; *Fricke* v. *Bechtold,* 168 N. Y. S. 2d 197; *Sonnenberg* v. *Sonnenberg,* 203 N. Y. S. 2d 118; *Skolnick* v. *Skolnick,* 204 N. Y. S. 2d 63; see *Drew* v. *Hobby, supra*).

The decisions last cited and others—rendered at various times during the past quarter-century—of course reflect impressive and reiterated judicial opinion that recognition of the decree with which this case is concerned would be consistent with New York's public policy. No change in public policy has been identified for us; and it is significant that despite the continuing awareness of those decisions in the field of law and in the community, the Legislature has never sought to limit their doctrine. (Compare the course of decision in the United States Supreme Court summarized in *Klarish* v. *Klarish,* 19 A. D. 2d 170, BERGEN, *J., aff'd* 14 N. Y. 2d 662.)

The trial court also indicated that Kaufmann and defendant had been guilty of collusion and violation of sec-

tion 51 of the Domestic Relations Law (now section 5-311, General Obligations Law); but in our opinion the evidence does not sustain such a finding (see *Matter of Rhinelander, supra; Graham* v. *Hunter,* 266 App. Div. 576; *Dodge* v. *Dodge,* 98 App. Div. 85; *Yates* v. *Yates,* 183 Misc. 934, VAN VOORHIS, *J.; Heine* v. *Heine, supra*).*

The annulment should be vacated and the injunction action reinstated, on the law and on the facts, without costs. Settle order on notice.

All concur. VALENTE and MCNALLY, *JJ.*, concur on additional grounds in separate concurring opinions.

VALENTE, *J.* (concurring):

I agree with the majority in the conclusion as to the validity of the Mexican divorce. However, I would deny an annulment to plaintiff husband upon an additional ground. This Court, in *Presbrey* v. *Presbrey,* 6 A. D. 2d 477, aff'd 8 N. Y. 2d 797 and *Packer* v. *Packer,* 6 A. D. 2d 464, expressly recognized the power in a court of equity to exercise discretion in granting annulments and to apply principles of equitable estoppel, particularly in a case where the party seeking affirmative relief had knowingly participated in or had acted upon what he was then seeking to have declared as null.

That discretion to deny equitable relief should properly be exercised in cases such as the instant one both from the standpoint of our public policy to preserve existing marriages and from the decidedly inequitable conduct of the plaintiff who entered into the marriage fully aware of the circumstances and the legal doubts surrounding the obtaining of the Mexican divorce decree. The evidence established that plaintiff knew of defendant's prior Mexican di-

* Speaking for myself, were it necessary to reach the estoppel issue, I would agree with the policy considerations expressed by Mr. Justice Valente in his concurring opinion, although I am not fully convinced that the present state of the law permits such a result.

vorce before the parties were married in November, 1956. In fact, before the parties went to the License Bureau, plaintiff arranged to have defendant bring the Mexican divorce decree to his attorney for examination and opinion. Moreover, the parties had the Corporation Counsel's office approve their respective divorce decrees before a marriage license was issued. After having been married for five and one-half years, plaintiff commenced this action in April, 1962 for an annulment. To grant an annulment herein would, in effect, import into the law a species of marriage terminable at the will of one spouse by the simple expedient of changing his attorney.

The law concerning the proper application of any principle of equitable estoppel in matrimonial actions involving claimed invalid foreign decrees of divorce has been in a confused and unsettled state. (See 44 Corn. L. Q. 150-157; Hofstadter & Richter, "Estoppel in New York Matrimonial Litigation," N. Y. L. J., Feb. 10, 11, 13, 1958.) Estoppel has been applied against one who has appeared in the challenged divorce proceeding (*Krause* v. *Krause,* 282 N. Y. 355) or who has taken advantage of the decree of divorce by remarrying (*Carbulon* v. *Carbulon,* 293 N. Y. 375). In Preliminary Draft No. 1 (1953) of the Restatement, Second, Conflicts of Laws, § 112, the rule is suggested that "a person may be precluded from questioning the validity of a divorce decree if, under the circumstances of the case, it would be inequitable to permit him to do so."

I would hold that one who knowingly accepts the benefits of a bilateral-appearance Mexican divorce decree, with awareness of the legal doubts with respect to it, even though not a party to the divorce proceeding, should not thereafter be permitted to change his position and challenge that decree before a court of equity. (See 77 Harv. L. Rev. 1531, 1534; 64 Col. Rev. 968, 973.)

There may be countervailing considerations of public policy, not present in the instant case, which preclude the

application of any equitable estoppel. Thus, cases involving "mail order" divorces stand on a different footing since in such instances "there is not even the slightest semblance or color of jurisdiction justifying action by a court." (*Caldwell* v. *Caldwell*, 298 N. Y. 146, 150-151.) So, too, where the subsequent marriage occurs before a divorce has become final, the attempted marriage is "wholly without validity from its beginning" and there is no "room for any counteractive estoppel." (*Landsman* v. *Landsman*, 302 N. Y. 45, 48.)

However, where, as here, the recognition of the validity of the Mexican divorce depends upon the exercise of comity —and, as the opinion of BOTEIN, *P.J.*, points out our courts have frequently recognized such decrees—a spouse should not be permitted, on equitable principles, collaterally to attack such a decree where the subsequent marriage was entered into with knowledge of the circumstances under which the divorce decree was obtained. Thus, irrespective of the conclusion of the majority as to the validity of the Mexican divorce decree, I would have denied plaintiff an annulment of the marriage in this case because he was equitably estopped from questioning the validity of the Mexican divorce decree obtained by his wife from her former husband.

McNALLY, *J.* (concurring):

I concur in the result on the ground that the bilateral Mexican divorce decree is grounded on a claim of residence, colorable though it may be, and a finding of residence by the Mexican court. In my judgment this distinguishes the instant case from *Wood* v. *Wood* (A. D. 2d), decided herewith, where there was no claim of residence and no finding of residence on the part of either party by the Mexican court.

APPENDIX D

Opinions and Judgment of the Court of Appeals

LEWIS S. ROSENSTIEL, Appellant *v.* SUSAN L. ROSENSTIEL, Respondent.

SUSAN L. ROSENSTIEL, Respondent, *v.* LEWIS R. ROSENSTIEL, Appellant.

HELENA A. WOOD, Respondent-Appellant, *v.* WALTER A. WOOD, Appellant-Respondent.

Decided July 9, 1965

I. *Rosenstiel* v. *Rosenstiel*

BERGAN, J. The defendant wife's former husband Felix Ernest Kaufman in 1954 obtained a divorce from her in a district court at Juarez in Chihuahua, Mexico. Plaintiff and defendant were married in New York in 1956 and this action by the husband seeks to annul that marriage on the ground the 1954 divorce is invalid and that, therefore, the defendant wife was incompetent in 1956 to contract a marriage.

In seeking the divorce in Mexico Mr. Kaufman went to El Paso, Texas, where he registered at a motel and the next day crossed the international boundary to Juarez. There he signed the Municipal Register, an official book of residents of the city, and filed with the district court a certificate showing such registration and a petition for divorce based on incompatability and ill treatment between the spouses.

After about an hour devoted to these formalities, Mr. Kaufman returned to El Paso. The following day his wife, the present defendant, appeared in the Mexican court by an attorney duly authorized to act for her and filed an answer in which she submitted to the jurisdiction of the court and admitted the allegations of her husband's complaint. The decree of divorce was made the same day. The judgment is recognized as valid by the Republic of Mexico.

The Divorce Law of the State of Chihuahua provides that the court may exercise jurisdiction either on the basis of

residence or of submission. Article 22 provides that the Judge "competent to take cognizance of a contested divorce" is the Judge "of the place of residence of the plaintiff" and of a divorce "by mutual consent", the Judge "of the residence of either of the spouses".

For the purposes of article 22, the statute further provides that the residence "shall be proven" by the "certificate of the Municipal Register" of the place (art. 24). Article 23, which has application to *Wood* v. *Wood,* provides that judicial competence "may also be fixed" by express or tacit submission.

After a trial at Special Term in the present husband's action for annulment, the court, holding that New York would not recognize the Mexican decree, granted jdgment for the plaintiff and annulled the marriage; the Appellate Division reversed this judgment and dismissed the complaint.

In the background of this problem is a long series of decisions over a period of a century in the New York Supreme Court at Appellate Division and at Special Term recognizing the validity of bilateral Mexican divorces which we consider has some relevancy to the question before us.[1] No New York decision has refused to recognize such a bilateral Mexican divorce.

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[1] *Kantrowitz* v. *Kantrowitz,* 21 A. D. 2d 654; *Matter of Klemas* v. *Klemas* 20 A. D. 2d 530; *Heine* v. *Heine,* 19 A. D. 2d 695, affg. 231 N. Y. S. 2d 239; *Busk* v. *Busk,* 19 A. D. 2d 700, affg. as mod. 229 N. Y. S. 2d 904; *Sonnenberg* v. *Sonnenberg,* 203 N. Y. S. 2d 118, app. dism. 11 A. D. 2d 1024; *Laff* v. *Laff,* 4 A. D. 2d 874, affg. 5 Misc. 2d 554; *Weibel* v. *Weibel,* 37 Misc. 2d 162; *Millman* v. *Millman,* 27 Misc. 2d 669; *Skolnick* v. *Skolnick,* 24 Misc. 2d 1077; *Bowen* v. *Bowen,* 22 Misc. 2d 496; *Fricke* v. *Bechtold,* 8 Misc. 2d 844; *Mitchell* v. *Mitchell,* 194 Misc. 73; *Matter of Fleischer,* 192 Misc. 77; *Costi* v. *Costi,* 133 N. Y. S. 2d 447; *Caswell* v. *Caswell,* 111 N. Y. S. 2d 875; *Mountain* v. *Mountain,* 109 N. Y. S. 2d 828; *Katz* v. *Katz,* N. Y. L. J., May 8, 1964, p. 16, col. 8; *Ocker* v. *Ocker,* N. Y. L. J., April 16, 1964, p. 19, col. 4; *Walker* v. *Walker,* N. Y. L. J., Jan. 14, 1964, p. 16, col. 5.

It has been estimated that many thousands of persons have been affected in their family and property status by these decisions (cf. Flint, Divorce by Personal Jurisdiction of the Parties—A Support for the Mexican Bi-lateral Divorce, 29 Albany L. Rev. 328, and Report of the Joint Legislative Committee on Matrimonial and Family Laws, N. Y. Legis. Doc., 1957, No. 32; *id.*, N. Y. Legis. Doc., 1961, No. 19). In this respect the problem in New York differs somewhat from that in New Mexico, New Jersey and Ohio which have as a matter of their own public policy refused to accept as valid such Mexican divorces (*Golden* v. *Golden*, 41 N. M. 356; *Warrender* v. *Warrender*, 42 N. J. 287; *Bobala* v. *Bobala*, 68 Ohio App. 63).

There is squarely presented to this court now for the first time the question whether recognition is to be given by New York to a matrimonial judgment of a foreign country based on grounds not accepted in New York, where personal jurisdiction of one party to the marriage has been acquired by physical presence before the foreign court; and jurisdiction of the other has been acquired by appearance and pleading through an authorized attorney although no domicile of either party is shown within that jurisdiction; and "residence" has been acquired by one party through a statutory formality based on brief contact.

In cases where a divorce has been obtained without any personal contact with the jurisdiction by either party or by physical submission to the jurisdiction by one, with no personal service of process within the foreign jurisdiction upon, and no appearance or submission by, the other, decision has been against the validity of the foreign decree (*Caldwell* v. *Caldwell*, 298 N. Y. 146 [1948]; *Rosenbaum* v. *Rosenbaum*, 309 N. Y. 371 [1955]).

Although the grounds for divorce found acceptable according to Mexican law are inadmissible in New York, and the physical contact with the Mexican jurisdiction was ephemeral, there are some incidents in the Mexican pro-

ceedings which are common characteristics of the exercise of judicial power.

The former husband was physically in the jurisdiction, personally before the court, with the usual incidents and the implicit consequences of voluntary submission to foreign sovereignty. Although he had no intention of making his domicile there, he did what the domestic law of the place required he do to establish a "residence" of a kind which was set up as a statutory prerequisite to institute an action for divorce. This is not our own view in New York of what a bona fide residence is or should be, but it is that which the local law of Mexico prescribes.

Since he was one party to the two-party contract of marriage he carried with him legal incidents of the marriage itself, considered as an entity, which came before the court when he personally appeared and presented his petition. In a highly mobile era such as ours, it is needful on pragmatic grounds to regard the marriage itself as moving from place to place with either spouse, a concept which underlies the decision in *Williams* v. *North Carolina I* (317 U. S. 287; see, especially, Justice FRANKFURTER's concurrence p. 304).

The voluntary appearance of the other spouse in the foreign court by attorney would tend to give further support to an acquired jurisdiction there over the marriage as a legal entity. In theory jurisdiction is an imposition of sovereign power over the person. It is usually exerted by symbolic and rarely by actual force, e.g., the summons as a symbol of force; the attachment and the civil arrest, as exerting actual force.

But almost universally jurisdiction is acquired by physical and personal submission to judicial authority and in legal theory there seems to be ground to admit that the Mexican court at Juarez acquired jurisdiction over the former marriage of the defendant.

It is true that in attempting to reconcile the conflict of laws and of State interests in matrimonial judgments entered in States of the United States, where the Constitution compels each to give full faith and credit to the judgments of the others, a considerable emphasis has been placed on domicile as a prerequisite to that compulsory recognition (*Williams* v. *North Carolina I, supra;* Michael Cardozo, Divorce Without Domicile, 39 Cornell L. Q. 293, 301). But domicile is not intrinsically an indispensable prerequisite to jurisdiction (cf. Stimson, Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory, 42 Amer. Bar Assn. J. 222 [1956]; Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study, 65 Harv. L. Rev. 193, 228).

The duration of domicile in sister States providing by statute for a minimal time to acquire domicile as necessary to matrimonial action jurisdiction, is in actual practice complied with by a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register. The difference in time is not truly significant of a difference in intent or purpose or in effect.

The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

Nevada gets no closer to the real public concern with the marriage than Chihuahua. New York itself will take jurisdiction of a matrimonial action without regard to domicile or residence if it happened, by mere fortuity, that the marriage was contracted here, even between people entirely foreign to our jurisdiction (Domestic Relations Law, § 170, subd. 2; see, e.g., *David-Zieseniss* v. *Zieseniss,* 205 Misc. 836; *Becker* v. *Becker,* 58 App. Div. 374).

A leading New York decision on the recognition of a divorce granted in a foreign nation where we are under no constitutional compulsion to give full faith and credit is *Gould* v. *Gould* (235 N. Y. 14 [1923]) and there the court sustained a judgment of divorce in France between parties not domiciled in France at a time when the husband, who instituted the French action, was domiciled in New York. Indeed, the New York law was applied by the French court because "the plaintiff Gould" was a resident of New York (p. 21).

The decision is not a clear precedent for the case now at bar; there are differences, e.g., the parties had substantial personal ties with France; the ground for the French divorce was the New York law; and this court laid down a number of precautionary warnings about the scope of its decision and what it was leaving open (pp. 29, 30).

Still the fact is that this court accepted as valid a judgment affecting marital status of a New York domiciliary granted by a court in a foreign nation, without requiring domiciliary status in that nation; and this aspect of the decision does have relevance here since it is not helpful on the question of French jurisdiction that the French court acted on its conception of New York law. It applied New York law for the very reason that Gould was not a domiciliary of France but of New York.

The opinion in *Caldwell* v. *Caldwell* (298 N.Y. 146, supra), dealing with divorces obtained on no personal presence or submission by either party in Mexico, the "mail-order decree", discusses domicile, but the question was not decisive of that case (cf. dissenting opinion, CONWAY, J., Matter of *Rathscheck,* 300 N.Y. 346, 355).

A balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy of this State.

The order should be affirmed, with costs.

II. *Wood* v. *Wood*

Although the Mexican decree of divorce in *Wood* v. *Wood* was entered under a provision of the Chihuahua Divorce Law (art. 23) which does not require proof of registration as a resident and which allowed jurisdiction to be taken by submission, the personal appearance in Chihuahua before the court of one party and the appearance through a duly authorized attorney by the other, require that for the purposes of New York public policy decision in this case be consistent with that in *Rosenstiel.*

On the wife's appeal from an affirmance of the dismissal of her complaint for separation based on cruelty, it is enough to say that if the facts as found and affirmed are accepted it was not error as a matter of law to dismiss the complaint.

The order should be affirmed, with costs, to plaintiff.

Chief Judge DESMOND (concurring in part). Although for reasons hereafter stated I would not void past-granted Chihuahua divorces, I emphatically reject the proposition that New York State must continue to recognize these one-day decrees awarded to our residents in manner and on theories repugnant to our basic ideas.

There is no justification in positive law, public policy, natural justice or morals for a validation by this court of the practice of some of the citizens of our State of going to Mexico for divorces of the sort attacked on these appeals. My vote against recognizing them for the future is based on these self-evident propositions:

1. Divorce decrees rendered in foreign countries and purporting to dissolve New York marriages are entitled to recognition and effect in New York State only when such recognition is consistent with the public policy of our State (*Gould* v. *Gould,* 235 N. Y. 14, 29; *Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375; see *Russian Republic* v. *Cibrario,* 235 N. Y. 255, 259; *Martens* v. *Martens,* 284 N. Y. 363, 365).

The *Gould* case (*supra*) is illustrative. There the New York courts upheld a divorce granted in France but only because the parties had actually lived for years in their Paris home and the decree was granted after an actual court contest without collusion and on a ground recognized in New York, that is, adultery.

2. Mexican "bilateral" divorces where one party crosses a bridge from El Paso, Texas, spends a day in Juarez and, by arrangement, the other appears by attorney, followed by a *pro forma* one-hour court appearance with no real hearing, or persuasive evidence or independent judicial determination lack almost all the elements which New York States considers requisites for a valid divorce. The residence requirements of the State of Chihuahua are minimal and inadequate to form a recognizable domiciliary jurisdictional base since in Mexico and contrary to our views neither spouse need have a true or real domicile in Mexico (see *Williams* v. *North Carolina,* 325 U. S. 226, 229-230; *Estin* v. *Estin,* 296 N. Y. 308, 312, aff'd. 334 U. S. 541). Domicile as the law uses the term means a fixed, permanent and principal home to which a person wherever temporarily located always intends to return (Black's Law Dictionary, 4th ed.).

3. No attention is paid in Juarez divorces to the principle, fundamental with us, that marriage is an institution in which the public as a third party has a vital interest (*Fearon* v. *Treanor,* 272 N. Y. 268; *Maynard* v. *Hill,* 125 U. S. 190; 2 Bishop, Marriage, Divorce and Separation, § 480). The Mexican State does not concern itself with maintenance of the marriage or reasons for its dissolution. In these latter respects the one-day judgments here attacked differ in no essential respect from the mail-order writs described in *Caldwell* v. *Caldwell* (298 N. Y. 146).

4. Such decrees are blatantly and obviously the fruit of consensual divorce arrangements and as such are forbidden by New York public policy statute (now General Obliga-

tions Law, § 5-311; see *Caldwell* v. *Caldwell,* 298 N. Y. 146, 150, *supra; Viles* v. *Viles,* 14 N. Y. 2d 365).

5. Although there is a line of lower court decisions in the State upholding these "Chihuahua" decrees (e.g., *Leviton* v. *Leviton,* 6 N. Y. S. 2d 535, 254 App. Div. 670) they are, so we are told and so it would seem, refused recognition everywhere else (see *Warrender* v. *Warrender,* 42 N. J. 287; *Golden* v. *Golden,* 41 N. M. 356; *Bobala* v. *Bobala,* 68 Ohio App. 63; *Bethune* v. *Bethune,* 192 Ark. 811; Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Compaartive Study, 65 Harv. L. Rev. 193; 1 Rabel, Conflict of Laws [2d ed., 1958] p. 513). Approval of these lower court decisions puts our State in the uneasy and inappropriate position of sole acceptor of Mexican "quickie" divorces. The suggestion in the majority opinion that these trial court and Appellate Division decisions, together with the fact that Mexico has issued numerous divorces to New Yorkers, plus the fact of advice by New York attorneys to their clients, force this court into a totally wrong public policy is a suggestion that answers itself. We are forgetting that the public policy of this State as to divorce "exists to promote the permanency of the marriage contracts and the morality of the citizens of the state" (*Hubbard* v. *Hubbard,* 228 N. Y. 81, 85).

Of course, it is in the modern manner to shrug off all this, to ask what is the difference between a one-day "domicile" in Juarez and a six weeks' "domicile" in Reno, to pile scorn and ridicule on New York's one-ground divorce law as archaic, cruel or worse. The approach is too facile. For 160 years New York as a State has recognized one cause only for divorce (Domestic Relations Law, § 170) and has refused to approve the practice of its domiciliaries going to other jurisdictions to evade our laws by obtaining divorces after short sojourns and on grounds not cognizable here (*Jackson* v. *Jackson,* 1 Johns. 424 [1806]). This official position of our State stands not on mere parochialism

but on some of the oldest and deepest-felt sentiments of humanity. As Lord MANSFIELD wrote long ago: "Matrimony was one of the first commands given by God to mankind after the Creation, repeated again after the Deluge, and ever since echoed by the voice of nature to all mankind." Seventy-seven years ago in *Maynard* v. *Hill* (125 U. S. 190, 205, *supra*) the United States Supreme Court referred to marriage as creating the most important relation in life and as having more to do with the morals of a civilized people than any institution, and pointed out that while marriage is in a sense a contract, it "'partakes more of the character of an institution controlled by public authority, upon principles of public policy, for the benefit of the community'" (Justice FIELD at pp. 205 and 213 of 125 U. S.). There can be no doubt that this speaks the public policy of our State to be changed only by the people through Constitution or statute. No court is licensed to write a new State policy, however attractive or convenient. As to divorces gotten in other States of the Union we are constrained to recognition by modern constructions of the Federal full faith and credit clause. But when asked to recognize divorces rendered in foreign countries we as a court have neither right nor need to look beyond our own declared and unmistakable State policy (*Martens* v. *Martens*, 284 N. Y. 363, 365, *supra*; *Caldwell* v. *Caldwell*, 298 N. Y. 146, *supra*).

As to analogizing the one-day Mexican divorce to the six weeks' Nevada decree, the first and ready answer is that judgments from other States are given faith and credit here because the Federal Constitution so commands. The second answer is a substitution of the true analogy, that is, between one-day foreign divorces and post-card foreign divorces, as between which there is no logical or real difference at all (see *Warrender* v. *Warrender*, 79 N. J. Super. 114, affd. 42 N. J. 287, *supra*).

It is suggested, too, that a Juarez divorce is some sort of official "act of State" of a sovereign foreign power and

as such, safe from our scrutiny or ban. That might be so as to Mexico divorcing her own citizens. But our recognition of any foreign judgments is a mere act of official courtesy, implying no surrender of our own soveignty. There is no compulsion. Were we to give credit to these Mexican judgments we would as a court be turning our backs on New York's restrictive divorce policy and allowing the divorce of our own citizen-residents by a foreign government having no interest in the marriage *res.*

For these reasons I vote for a declaration that such divorces are void, but I am not bound to and do not vote to give this ruling any more than prospective effect. I cannot shut my eyes to the realities. Tens of thousands of such purported divorces have been granted to New Yorkers who acted on advice of attorneys who relied on 25 years of decisions by the New York lower courts. No social or moral purpose would now be served by ruling that marriages long ago dissolved are still in existence, and the result would be destructive to the present homes, marriage and lives of those who remarried on the strength of Juarez decrees. This court has a clear right to give our ruling prospective effect only (see *Lyon* v. *Richmond,* 2 Johns. Ch. 51; *Harris* v. *Jex,* 55 N. Y. 421; *Great Northern Ry.* v. *Sunburst Co.,* 287 U. S. 358; *Linkletter* v. *Walker,* 33 U. S. L. W. 4576) and justice and fairness dictate that we should do so and refuse to allow these plaintiffs or others to attack collaterally such past rendered Mexican "one-day" divorces.

None of the other points made by counsel requires discussion herein.

In each case the order should be affirmed, with costs, but with the clear understanding that divorces of this sort granted after the date of the decision of these appeals will be void in New York State.

Scileppi, J. (dissenting). I agree with the Chief Judge inasmuch as he would hold that these divorces are void;

however, I would permit the present appellants to succeed on this appeal.

As we analyze the cases in this area, we must be ever mindful that we are not dealing with a decree of a sister State, but with one of a foreign nation. Decrees of a foreign nation are not only not entitled to full faith and credit, but are not even entitled to prima facie validity despite any allegation of jurisdiction which may appear on the face of the judgment (*Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375). *The sole criterion by which these decrees may be judged is whether they contravene our public policy* (*Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375, *supra*).

It is fundamental to our concepts of jurisprudence that a court which purports to act must have jurisdiction over the subject matter of the action. The general rule has become firmly established that jurisdiction over the subject matter of an action for divorce depends upon the domicile of at least one party in the decree rendering forum (*Senor* v. *Senor,* 272 App. Div. 306, 310-311, affd. 297 N. Y. 800; *Solotoff* v. *Solotoff,* 269 App. Div. 677; see, also, *Matter of Lindgren,* 293 N. Y. 18, 24).

In *Williams* v. *North Carolina I* (317 U. S. 287, 298) the Supreme Court held that domicile of one party creates an adequate relationship with a State to justify its exercise of power over the marital relationship. And in *Williams* v. *North Carolina II* (325 U. S. 226, 229-230) Mr. Justice FRANKFURTER had the following to say about this fundamental concept: "Under our system of law, judicial power to grant a divorce — jurisdiction, strictly speaking — is founded on domicile. *Bell* v. *Bell,* 181 U. S. 175; *Andrews* v. *Andrews,* 188 U. S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities

of the utmost significance. The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina, supra,* the jurisdictional requirement of domicile is freed from confusing refinements about 'matrimonial domicile,' see *Davis* v. *Davis,* 305 U. S. 32, 41, and the like."

Relying heavily on *Williams II,* the Third Circuit (per GOODRICH, J.) held that domicile is the indispensable element of divorce jurisdiction (*Alton* v. *Alton,* 207 F. 2d 667, 677, judgment vacated and the proceeding dsmd. as moot 347 U. S. 610).

To characterize one as a "domiciliary" is to clothe him with the strongest possible ties to a jurisdiction. However, this court has held that domicile, in a strict sense, is not required before a foreign nation may render a divorce decree affecting our citizens (*Gould* v. *Gould,* 235 N. Y. 14).[1] In that case, husband and wife, New York domiciliaries, moved to France, purchased a house and dwelt there for five years. After this period, the husband brought suit for divorce in France on the ground of adultery, and judgment in his favor was rendered by the French court, applying New York law. On a motion for judgment on the pleadings in an action for divorce by the wife in New York, this court, carefully limiting itself to the circumstances of the case, held that Special Term was correct in declaring that the French decree did not offend our public policy and was entitled to recognition under rules of comity (p. 29). The court (per HOGAN, J.) emphasized the undisputed fact that the parties had established a bona fide residence in France, and, in the concluding paragraph of the opinion, took pains to note: "If in the instant case the judgment of the courts of France disclosed that the parties were merely sojourn-

[1] For a discussion of this case including comments by scholars in the area consult 1 Rabel, The Conflict of Laws: A Comparative Study (2d ed., 1958), p. 531.

ing in France at the time the decree of divorce was granted, or that a residence in France was of such limited duration as to lead the Supreme Court to believe that the decree was the result of collusion, or the judgment was rendered for a cause not recognized as sufficient cause for absolute divorce by the law of this State, it may be that the justice presiding would be justified in holding that the decree was contrary to the policy of this state and in a refusal to give effect to the evidence sought to be established thereby. We leave those questions open." (*Gould* v. *Gould,* 235 N. Y. 14, 29-30, *supra*). It is obvious, therefore, that New York requires that there be a relationship of substantial permanence between the decree rendering nation and the subject matter of the action, the marital *res.* Lack of jurisdiction over the subject matter of a controversy cannot, of course, be cured by the mere personal appearance of the parties (*Matter of Lindgren,* 293 N. Y. 18; *Solotoff* v. *Solotoff,* 269 App. Div. 677).

Would the public policy of our State be served by departing from that well-established rule? I do not believe so. Illustrative of the many cases emphasizing the vital stake which the State has in every marriage contract is *Fearon* v. *Treanor* (272 N. Y. 268) wherein this court stated (pp. 272-273):

"Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State. 'Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure of form essential to constitute marriage, the duties and obligations

it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.' (*Maynard* v. *Hill*, 125 U. S. 190, 205.)

"There are, in effect, three parties to every marriage, the man, the woman and the State. (*Trammell* v. *Vaughan*, 158 Mo. 214.) * * * The Domestic Relations Law provides in great detail when and how marriage may be entered into, how the relation may be dissolved, the grounds for divorce and annulment, the rights and liabilities of husband and wife, the age at which the relation may be entered into and the class of persons who are disqualified from marrying.

"From time immemorial the State has exercised the fullest control over the marriage relation, justly believing that happy, successful marriages constitute the fundamental basis of the general welfare of the people."

In addition, Justice DOUGLAS in *Williams* v. *North Carolina I* (317 U. S. 287, 298-299) stated: "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interest, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent."

Faced with this overwhelming interest of the State in the marital relationship, an interest which our State still maintains even in a "highly mobile era", we should not discard the rule that jurisdiction over the subject matter of a divorce action requires a substantial relationship between the decree rendering jurisdiction and the marital *res*.

It is anomalous, indeed, that we are today upholding a one-day Mexican divorce decree while several of our sister States, which afford grounds for divorce not afforded by us, have refused to recognize such a decree. As recently as 1963, New Jersey, in *Warrender* v. *Warrender* (79 N. J. Super. 114, affd. on op. below 42 N. J. 287), declared that a decree of divorce rendered in Juarez upon the personal appearance of the plaintiff and appearance by attorney of the defendant was void. The court observed that "there is no basis for according greater recognition to a Mexican divorce on a one-day appearance than to the mail-order variety" (79 N. J. Super. 118).

In 1940 the Ohio Court of Appeals had occasion to rule on the bilateral Mexican divorce (*Bobala* v. *Bobala,* 68 Ohio App. 63). Having analyzed the problem along the lines of subject matter jurisdiction, concluding that the Mexican court was not possessed of such jurisdiction, and determining that the consent of the parties could not confer it, the court held that comity would not be extended.[2]

Professor Rabel observes that in spite of the many concepts of jurisdiction which the different systems of jurisprudence espouse, one condition required by all when they concern themselves with the recognition of foreign judgments of divorce overshadows all differences, "viz, that the court of judgment must have had jurisdiction in the international sense, i.e., according to the conceptions of the forum where recognition is sought" (1 Rabel, The Conflict of Laws: A Comparative Study [2d ed., 1958], p. 531). This court has unequivocally embraced the principle of jurisdiction in the international sense when we required the invocation of the jurisdiction of a foreign court "as we understand those terms" (*Caldwell* v. *Caldwell,* 298 N. Y. 146, 150). In that case we held that where neither spouse was before the court, a divorce rendered by a

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[2] Compare *Golden* v. *Golden* (41 N. M. 356) with *Ferret* v. *Ferret* (55 N. M. 565).

Mexican court which had acquired personal jurisdiction over *both* parties by virtue of the appearance of two properly empowered Mexican attorneys was void. However, I cannot emphasize too strongly that the decree was valid in Mexico. In other words, a decree may be valid where rendered yet not be entitled to recognition in New York, if it offends our public policy. (*Caldwell* v. *Caldwell*, 298 N. Y. 146, *supra*.)

As this court noted in *Caldwell* (p. 150): "There is not even the slightest semblance or color of jurisdiction justifying action by a court. The spouses here never submitted themselves to nor invoked the jurisdiction of a court of a foreign nation *as we understand those terms*. They violated our statute embodying our public policy (Domestic Relations Law, § 51). Their collusive agreement and conduct may not be the foundation for the creation of any rights." (Emphasis supplied.)

Since we in New York recognize the acquisition of personal jurisdiction by the personal appearance of a properly authorized attorney, and since *Caldwell* unequivocally denounces the lack of jurisdiction "as we understand those terms", that case must, of necessity, denounce the lack of jurisdiction ("as we understand those terms") over the subject matter of the action, i.e., the marital *res*, as fatal.

Therefore, under the well-grounded concepts of jurisdiction over the subject matter, and jurisdiction in the international sense as delineated by Rabel and as embraced by this State (until today) in *Caldwell* (*supra*), and relying upon *Caldwell* itself, I would hold that it is against the public policy of New York to recognize the divorce decree of a foreign nation when such decree is not based upon jurisdiction over the subject matter, i.e., when there is no relationship of any degree of permanence between the marital *res* and the decree rending jurisdiction. Obviously, the interest and concern which New York has in the marriage of its citizens are infinitely greater than Mexico's.

I am unwilling to hold that, although our public policy is violated when a husband and wife execute powers of attorney and mail them to Mexican attorneys, it is not violated when one spouse, armed with the other's power of attorney, makes a momentary physical appearance in Juarez, which, in the language of the majority, is nothing more than "ephemeral".

I am convinced that, with the decision in this case, this court has rekindled the spark still burning in the breasts of some that so-called Mexican mail-order decrees may one day be recognized as valid in this State. I agree with the Chief Judge that there is no distinction of substance between mail-order decrees and the decrees which have received the stamp of approval in the cases before us. Indeed, if the Mexican courts are jurisdictionally empowered to sever the matrimonial bonds of New York residents upon what the majority concedes to be a most flimsy jurisdictional basis, I fail to see why they are not jurisdictionally empowered to sever those bonds by mail with the virtue at least of its resultant economic benefit of avoiding the necessity of even a one-day trip.

In the briefs, great reliance was placed upon the following statement in *Matter of Rhinelander* (290 N. Y. 31, 36-37): "It is no part of the public policy of this State to refuse recognition to divorce decrees of foreign states when rendered on the appearance of both parties, even when the parties go from this State to the foreign state for the purpose of obtaining the decree and to obtain it on grounds not recognized here. (*Glaser* v. *Glaser* [276 N. Y. 296], *supra*, p. 302.)" This statement can afford the respondents little comfort because it does not address itself to the situation, as in the case at bar, where the rendering court lacks subject matter jurisdiction as we know it. Once such jurisdiction is posited, the statement is true. The citation to *Glaser* v. *Glaser* (276 N. Y. 296) bears out this view because, in *Glaser*, the New York trial court found as a fact that de-

fendant "'duly became a resident of the State of Nevada'" (p. 299), thus giving Nevada a jurisdictional predicate upon which to act.

In my opinion, recognition should not be given to the decree of any foreign country affecting the marital status of New York domiciliaries where the plaintiff in the decree granting country did not and never intended to sever his ties with this State unless, as in *Gould* (*supra*), he had very substantial ties in that country. I say this not because I feel that there is anything sacred about the concept of domicile, but because I feel that there is something sacred about marriage; and because I feel that no foreign country has, or should be recognized as having, the power to dissolve such a relationship between New York citizens when, in no inconsiderable number of cases, the irreparably destructive effects of such dissolution are to be borne in part by *all* of the people of this State and because I feel that the public policy of this State, which has remained unchanged these many years, absolutely compels us to refuse to acknowledge the existence of such power in any foreign country.

I agree with the majority that "our public interest is not affected differently by a formality of one day than by a formality of six weeks" and that "Nevada gets no closer to the real public concern with the marriage than Chihuahua" (p. 73). But—and this distinction is crucial—in the case of a sister State we are *compelled* to give full faith and credit to its decrees. In the case of a foreign country we are not compelled to do so and should not voluntarily recognize its decrees.

So-called "realties of life" and "contemporary experience", assuming that such considerations may be accurately assessed, which I doubt, are not reliable bases for determining public policy. That some, perhaps many, choose to treat their marriage contract with the same indifference that they would a commercial contract does not mean that we should indorse such conduct.

In addition to abandoning the requirement that a court which affects the marital status of our citizens should have subject matter jurisdiction, the majority has chosen to ignore the basic concepts and value judgments which permeate our Domestic Relations Law. The Legislature has seen fit to permit divorce in this State only because of the adultery of the defendant (Domestic Relations Law, § 170). This is certainly indicative of a design to restrict the availability of divorce and in so doing to preserve the family unit. Such preservation is considered vital and indispensable to the welfare and stability of the family, the ultimate goal being a climate conducive to the better development of our society. This court has a duty not to sanction the casual and consensual dissolution of the marriage contract by two of the three parties interested therein. This is especially true in light of the clear public policy announced in section 5-311 of the General Obligations Law, and in *Viles* v. *Viles* (14 N. Y. 2d 365). To recognize these divorces is to disregard the traditionally solemn nature of the marriage contract (see *Fearon* v. *Treanor*, 272 N. Y. 268, *supra*), legislative pronouncements, e.g., Domestic Relations Law, § 170; General Obligations Law, § 5-311), and decisions of this court (e.g., *Viles* v. *Viles*, *supra*; *Caldwell* v. *Caldwell*, 298 N. Y. 146, *supra*).

I am fully aware that a vast number of our citizens, relying upon the pronouncements below, have remarried, established families, acquired property, and engaged in many activities, personal and financial, as husband and wife. To accord this decision traditional retroactive effect would indeed have a profoundly convulsive and disruptive effect on our State, and on our citizens, who acted in good faith reliance on the law as enunciated below. However, to hold this divorce valid merely because our lower courts have been recognizing similar ones as such, and because many have placed reliance on those decisions, is no answer to the public policy considerations presented in this case. If this divorce is void, we should say so regard-

less of these prior decisions in our lower courts.[3] Nonetheless, I also recognize that there are public policy considerations which should be taken into account concerning parties who have already obtained such divorces in reliance upon those decisions. Therefore, again as a matter of public policy, I would hold that, although Mexican divorce decrees of this type are void, this decision should not be applied retroactively. It is certainly within our power as the highest court in the State to give a decision such effect and not violate the Federal Constitution (*Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 364). I point out that this is a case where there are overriding and compelling reasons of public policy for refusing to give retrospective effect. I note that no one is being injured and no established rights are being impaired by such a disposition.

The doctrine of prospective application is a device which I believe should be invoked only in the most compelling circumstances. Such circumstances are here presented. The doctrine has been applied in Michigan (*Parker* v. *Port Huron Hosp.*, 361 Mich. 1), when the court renounced charitable immunity for nonprofit hospitals, noting: "we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of the filing of this opinion" (361 Mich., p. 28). The Illinois court had occasion in *Molitor* v. *Kaneland Community Unit Dist. No. 302* (18 Ill. 2d 11) to take the same approach in a similar immunity case, i.e., school districts were held liable in negligence to the plaintiff therein and to future plaintiffs. Wisconsin too, motivated by deep considerations of public policy, saw fit to abolish immunity of charitable hospitals prospectively only and to follow *Molitor* in giving the litigants

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[3] In this connection we should recall that this is the first time that we have had this question before us, and that this court has no power to issue advisory opinions.

then before the court the benefits of the ruling. *Kojis* v. *Doctors Hosp.*, 12 Wis. 2d 367.)

In sum, for reasons of public policy, I would give this decision prospective effect only but would permit the appellants here to reap the benefits of the appeal for the reasons aptly set forth in *Molitor* v. *Kaneland Community Unit Dist. No. 302* (18 Ill. 2d 11, 27-28, *supra*): "Likewise there is a substantial authority in support of our position that the new rule shall apply to the instant case. (*Dooling* v. *Overholser,* (D. C. cir.) 243 F. 2d 825; *Shioutakon* v. *District of Columbia,* (D. C. cir.) 236 F. 2d 666; *Durham* v. *United States,* (D. C. cir.) 214 F. 2d 862; *Barker* v. *St. Louis County,* 340 Mo. 986, 104 S. W. 2d 371; *Farior* v. *New England Mortgage Security Co.,* 92 Ala. 176, 9 So. 532; *Haskett* v. *Maxey,* 134 Ind. 182, 33 N. E. 358; *Daucey* v. *Farney,* 173 N. Y. Supp. 530.) At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere *dictum.* Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus, there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it." This view was adopted by the Wisconsin Supreme Court in *Kojis* v. *Doctors Hosp.* (12 Wis. 2d 367, 374, *supra*). Of course, parties to cases which have already been decided and which have already upheld their divorces could obtain no benefit from the consideration afforded these appellants (*Lyon* v. *Richmond,* 2 Johns. Ch. 51, 59, per KENT, Ch., revd. on other grounds 14 Johns. 501).

The order of the Appellate Division vacating the judgment of annulment and reinstating Mrs. Rosenstiel's

injunction action restraining Mr. Rosenstiel from seeking marital relief outside this jurisdiction should be reversed.

In *Wood* v. *Wood* decided herewith, I would modify the order of the Appellate Division to the extent of granting the defendant's counterclaim for annulment. In all other respects I would affirm.

Judges Dye, Fuld and Van Voorhis concur with Judge Bergan; Chief Judge Desmond concurs in part in an opinion; Judge Scileppi dissents and votes to reverse in an opinion; Judge Burke taking no part.

In each action: Order affirmed.

APPENDIX E

Relevant Portions of Petitioner's Briefs in the New York Court of Appeals

(1) Petitioner's Main Brief in the Court of Appeals Pp. 8-12.

THE MEXICAN DIVORCE OBTAINED BY RESPONDENT AND HER FIRST HUSBAND IS A NULLITY UNDER THE LAWS OF THIS STATE.

It should be recalled at the outset that the Trial Court was not under a constitutional compulsion to afford "full faith and credit" to the Mexican decree in issue. It is settled that the full faith and credit clause has no application to decrees of foreign nations or their political subdivisions. Article IV, Section I, United States Constitution; *Aetna Life Insurance Company* v. *Tremblay,* 223 U. S. 185 (1912).

Under the controlling principle of comity, the Trial Court was only obliged to afford the Mexican court that courtesy and deference which is permitted by our State's determination of public policy. The dictinction was stated by this Court in *Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375 (1955):

> "'* * * we have never held that any such presumptive legality and validity must be accorded Mexican divorces—which are, of course, beyond the scope of 'full faith and credit' [citations omitted]. Judgments of courts of foreign countries, * * * 'differ from judgments of courts of our sister States to which, by constitutional mandate, full faith and credit must be given. They must not contravene our public policy'. Thus, under comity—as contrasted with full faith and credit—our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons, despite whatever allegations of jurisdiction may appear on the face of such foreign judgments."

The Court below ignored this crucial distinction.

Thus, it held that in *Glaser* (276 N. Y. 296) and *Rhinelander* (290 N. Y. 31), both dealing with *sister state* judgments of divorce, this Court "expounded" this State's public policy with respect to *foreign nation* divorce decrees* (1831).

Also, in a pregnant juxtaposition, it concluded that "New York's indifference, in the juridical sense, as to whether [our residents achieve] domiciliary status in the foreign *state,* if they both appeared there" requires recognition to be accorded "*Mexican* decrees, if, as here, the petitioning spouse has appeared in person and the answering spouse in person or by attorney."** (1832) (Emphasis added).

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* The very quotations from *Glaser* and *Rhinelander* relied upon by the Court below show plainly that this Court was there concerned with the judgments of sister states—rather than foreign nations.

** The Court's use of the word "indifference" connotes a *voluntary* rejection of the domiciliary nexus as the basis for divorce jurisdiction, whereas in *Glaser* and *Rhinelander* this Court merely afforded sister-State judgments that deference which it was constitutionally obliged to pay.

The Court below's suggestion to the contrary notwithstanding, it seems perfectly plain that its decision cannot be sustained on the theory that this Court has heretofore decided that the public policy of this State permits recognition of the sham divorce proceedings in issue.

On the contrary, it has been suggested that in *Caldwell* v. *Caldwell*, 298 N. Y. 146 (1948), this Court finally determined that the validity of foreign divorces does not turn merely on compliance with the laws of a forum which might presume to alter the marital status of New York domiciliaries who may be found, accidently or on purpose, in the presence of the foreign court.

In *Caldwell*, as here, two New York domiciliaries decided, in New York, to be divorced. As here, they originally planned a sister-State divorce but later decided that a Mexican divorce would be more expedient. As here, a single New York attorney was engaged, who, in turn, arranged for two attorneys resident in Mexico to appear for the parties.

In refusing recognition to a "mail order" decree obtained by the parties, this Court stated in *Caldwell* (at 150):

> "The spouses here never submitted themselves to nor invoked the jurisdiction of a court of the foreign nation as we understand those terms. They violated our statute embodying our public policy (Domestic Relations Law, § 51). Their collusive agreement and conduct may not be the foundation for the creation of any rights."

The Court below did not treat the question of how Kaufmann's one hour visit to Mexico took the planned dissolution of respondent's marriage out of the prohibition of § 51.* Nor did it explain how the visit operated to confer

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* Here, respondent appeared in the Mexican proceedings "by mail". Her Mexican attorney, pursuant to a power of attorney received in the mail, confessed judgment in the Mexican court and joined in Kaufmann's plea for divorce. Of course, respondent's appearance by proxy, took place after Kaufmann had already returned to the United States (*supra*, p. 6).

greater validity on respondent's divorce than that accorded Mexican divorces obtained by perhaps less affluent New Yorkers who are forced to resort to the mails in their attempt to obtain a divorce by consent.

Rather, it summarily concluded (1832), based upon this Court's observation in *Caldwell* that "[n]either the defendant nor his wife visited Mexico," that the physical presence in Mexico, no matter how brief, of one of the parties to a planned Mexican divorce reconciles such a divorce with the public policy of this State.*

In refusing recognition to respondent's Mexican divorce, the Trial Court held (1793-4):

> "Domicile as the *sine qua non* requisite for jurisdiction to grant a divorce is rooted in the basic concept of social rights and obligations in the marital *res*. The marriage contract creates not only personal rights and obligations, but transcending these, there arises a social—the state's interest in the marriage. 'The authority of a court to dissolve the marriage bond, therefore, must rest upon the authority of the state over the marriage, requiring that at least one of the parties be a domiciliary of this state * * * ' (Senor v. Senor, 272 App. Div. 306, 310-311, affd. 297 N.Y. 800)."

The Trial Court rested on the settled jurisdictional principle that a State may only dissolve the marital relationship of its own domiciliaries. The rule was stated by the Supreme Court of the United States in *Williams* v. *North*

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* The distinction is a sham. Certainly, the law of this State cannot be said to turn on the difference in cost between a postage stamp and an airline ticket to El Paso, Texas. Nor would public policy tolerate a distinction based on the inconvenience to our domiciliaries of an overnight stay at an El Paso hotel and a walk across the International Bridge.

If the distinction made by the Court below is upheld the laws of this State protecting the integrity of the family relationship will have been judicially repealed and divorce by handshake will have been sanctioned.

Carolina, 325 U. S. 226, 229 (1945) wherein Mr. Justice Frankfurter, speaking for the Court, emphatically stated:

> "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. [Citations omitted] The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English speaking world has questioned it."

So unanimous have been the courts of this country in so holding that divorce actions have been characterized as *in rem* in nature, the *res* being the marital relationship of the parties. See *Alton* v. *Alton,* 207 F. 2d 667, 674 (3rd Cir. 1953) appeal vacated as moot, 347 U. S. 610 (1954).

And so deeply has it been thought that the responsibility for regulating divorce is that of the domicile that the courts throughout this nation have fashioned a unique choice of law rule applicable to divorce actions—a rule more common to actions *in rem*—namely, that the substantive law of the forum controls.*

It is absolutely unquestionable that the practice of our Courts in applying the law of the forum in divorce litigation is owing to a universal recognition that only the domicile of a party to a marriage may presume to affect the marital relationship.

So basic has it been considered that domicile is the sole basis for divorce jurisdiction, that in 1953 the Court of Appeals for the Third Circuit, in *Alton* v. *Alton, supra,* held unconstitutional a Virgin Islands statute which, in effect, vested in its courts divorce jurisdiction without reference to domicile.

There, the Court held that the statute, by converting marital actions to "simple transitory action[s]" violated

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* It is precisely this unique choice of law rule which has given impetus to the American phenomenon of the "migratory divorce."

time-honored principles of jurisdiction and wrested from other states their power and right to regulate the domestic relations of their domiciliaries in violation of the due process clause of the Fifth Amendment.

In so holding, the *Alton* Court stated (207 F. 2d at 673, 676):

> "The background of divorce legislation and litigation shows that it has not been considered a simply transitory personal action. The principle said to govern is that marriage is a matter of public concern, as well as a matter of interest to the parties involved. Because it is a matter of public concern, the public, through the state, has an interest both in its formation and in its dissolution, and the state which has that interest is the state of domicile, because that is where the party 'dwelleth and hath his home.'
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> "The Restatement of Conflict of Laws says flatly that a state may not create an interest where it does not have jurisdiction. Undoubtedly the result of a divorce decree is to affect interests in a matrimonial relationship. If it is still correct to say that the basis for divorce jurisdiction is domicile, a state where the party is not domiciled is, in rendering him a divorce, attempting to create an interest where it has no jurisdiction. Its attempt to do so is an invalid attempt, and contrary to the due process clause.
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> "We think that adherence to the domiciliary requirements is necessary if our states are really to have control over the domestic relationships of their citizens."

The Supreme Court granted certiorari in *Alton*, but since the husband had, in the interim, secured a divorce in the state of his domicile, it dismissed the appeal as moot, 347 U. S. 610 (1954). Subsequently, in *Granville Smith* v. *Granville Smith*, 214 F. 2d 820 (3d Cir. 1954), the dismissal of a divorce suit was sustained on the authority of *Alton*. The Supreme Court affirmed, but the jurisdictional issue was not explored. 349 U. S. 1 (1955).

In *Petition of Taffel*, 49 F. Supp. 109 (1941), the Federal District Court for the Southern District of New York, invalidated a Mexican "mail order" divorce. Its condemnation of the collusive Mexican divorce, however, applies with equal vigor to respondent's divorce. The Court did not, as did the Court below, rely on an unexplained and indefensible distinction between "mail order" divorces and "plane-ticket" divorces such as the one at Bar. The Court stated (at p. 110):

> "The basic principle underlying the dissolution of the marital status is that the marriage relationship is so interwoven with public policy that 'the consent of the parties is impotent to dissolve it contrary to the law of the domicile.' Andrews v. Andrews, 188 U.S. 14, 41, 23 S. Ct. 237, 244, 47 L. Ed. 366.
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> In New York the law of domicile expressly provides that a husband and wife cannot contract to dissolve the marriage relationship (Domestic Relations Law, Section 51), which is precisely what the parties attempted to do in the Mexican divorce action by procuring a consent divorce without ever relinquishing their matrimonial domicile here. Though the Mexican court may have had jurisdiction over the persons by virtue of their voluntary appearance by attorneys, the court obviously lacked jurisdiction over the subject matter, the matrimonial status, and thus completely lacked juridical power to dissolve that status. Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.
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> " * * * the marital status of the parties resident in the State of New York is a matter of exclusively domestic concern and its courts are not required to recognize the judgment of a foreign country as having effect upon that status * * *."*

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* Several sister states have squarely held that, under settled jurisdictional principles and their public policy, the divorce here in issue can have no greater validity than Mexican divorces of the "mail order" variety. See, e.g., *Warrender* v. *Warrender*, 79 N. J. Super. 114 (1963), aff'd 42 N.J. 287 (1964) (even where original parties to Mexican divorce are before the Court); *Bobala* v.

The Court below held that since *Gould* v. *Gould*, 235 N. Y. 14 (1923) it has been settled in this State that something less than domicile in the strictest sense is adequate to vest in a foreign forum jurisdiction to dissolve the marriage of our domiciliaries. As the Court below recognized (1831) the facts in *Gould* are "remote" from those at Bar. This Court merely held that it is not offensive to the public policy of this State to recognize a foreign litigated divorce, awarded on grounds recognized here (adultery), and based upon a jurisdictional nexus with the granting forum of less than domicile in the strictest sense.

Here, unlike in *Gould*, the parties agreed in New York to be divorced. Their contacts with the foreign forum were contrived and of only the most transitory nature. The grounds upon which they obtained the divorce are not recognized here. Moreover, the grounds were unrelated to the truth and were concocted by Mexican attorneys with whom respondent and her prior sqouse did not even consult.

In *Gould* this Court enunciated the public policy of our State and the extent to which that policy permits recognition of judgments of divorce granted by foreign countries. This Court stated (at 25-7):

> "In Hubbard v. Hubbard (228 N. Y. 81, 85) we held that as the law of this state had provided but one suffi-

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Bobala, 68 Ohio App. 63 (1940) (even where original parties before the Court and Mexican divorce a bitterly contested one); *Golden* v. *Golden*, 41 N. M. 356 (1937) (even where both parties personally visited Mexico for purpose of obtaining divorce. Said the Court, the parties "might just as well have transacted the entire proceeding by phone or mail * * *".)

Several sister states have condemned "mail order" divorces (see e.g. *Ryder* v. *Ryder*, 2 Cal. App. 2d 426 (1934); *Newton* v. *Newton*, 13 N. J. Misc. 613 (1935); *Wells* v. *Wells*, 230 Ala. 430 (1935); *Miller* v. *Miller*, 173 Miss. 44) and *ex parte* Mexican divorces (see e.g. *Bonner* v. *Reandrew*, 203 Iowa 1355 (1937); *Bethune* v. *Bethune*, 192 Ark. 811 (1936)), on grounds common to the divorce here in issue.

cient cause, to wit, adultery, for absolute divorce, the policy of this state 'exists to promote the permanency of the marriage contract and the morality of the citizens of the state. * * * '

In the foregoing excerpt from the opinion in the *Hubbard* case, we find clearly defined the policy of this state, the nature of the sound judicial discretion to be exercised by the courts and the limitation upon the exercise of such discretion. We may assume that the justice at Special Term in determining the effect to be given to the judgments of the courts of France gave consideration to the fact that the republic of France was one of the independent powers of the world, having diplomatic intercourse with the United States. Thereupon from the judgments and pleadings, briefly to recapitulate, there was disclosed absence of collusion between the parties. Adultery is a cause for absolute divorce and a crime by the laws of this state and of the republic of France. Plaintiff and defendant had for a number of years permanently resided in France as husband and wife in a home owned and maintained by defendant. During that time the parties had not been in this state or country. In an action brought in France by defendant against plaintiff for absolute divorce plaintiff was personally served with process and contested so far as able to do so in the courts of France the action brought against her. She contested the jurisdiction of the court notwithstanding she had invoked the jurisdiction of the same court in an action brought by her against defendant for like cause which is still pending. Thus both parties, though Americans, invoked the jurisdiction of the French courts.

The courts of France applied the law of this state in the judgment. After the recovery of the judgment against plaintiff in France, she left that country, returned to England, from whence she originally came, and only visited this state to invoke the jurisdiction of our courts in the present action. The defendant has no apparent intention to return to this state in which he claims a legal domicile, but to permanently reside in France.

The justice at Special Term held that the judgments of the courts of France were in harmony with the pol-

> icy of this state; that the effect to be given to evidence of such judgments was, that the courts of France had jurisdiction of the person of defendant and subject matter of the action; that the judgment operated to dissolve the marital relation between the parties and for a cause for which a judgment would be granted in this state, and that plaintiff herein was not at the time of the commencement of this action entitled to maintain the same.
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> In view of the enumerated facts, the circumstances of this case, the policy of this state and the principles of comity, we are led to the conclusion that the effect given the judgments of the courts of France by the justice at Special Term, affirmed by the Appellate Division, was justified. * * * "

It insults intelligence to argue that, in *Gould,* this Court forecast the decision of the Court below that the sham divorce proceedings now before this Court are consonant with the public policy of this State.

Ultimately, in awarding recognition to respondent's divorce, the Court below relied (1832) upon its decision without opinion in *Leviton* v. *Leviton,* 254 App. Div. 670 (1938), modifying a Special Term order of Mr. Justice McCook, and the later cases decided in the Appellate Division and the lower courts which followed *Leviton.*

Of course, *Leviton* is clearly distinguishable from this case.* To the extent, however, that it and the cases follow-

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* There the original parties to the Mexican decree were before the court. What is more, both parties personally appeared in Mexico and the Mexican judgment of divorce recited that that court had determined that the parties were domiciliaries of Mexico. It should also be noted that in *Leviton* the court decided a motion on the pleadings and was obliged to accept as true, for the purposes of that motion, all the allegations made in the pleadings. The court's denial of the complaining party's motion to dismiss a defense which relied upon the Mexican divorce did not, as a matter of law, preclude a showing, upon a later trial, that in fact both parties were not personally present in Mexico or that they did not litigate the issue of domicile.

ing it are undistinguishable from this one, they are plainly unsound and inconsistent with the repeated pronouncements of this Court, and should be rejected.

The Appellate Division wrote no opinion in *Leviton*. We must look for the *ratio decidendi* of that decision in the opinion of Special Term (6 N. Y. S. 2d 535).

Mr. Justice McCook, while noting that the facts before him engendered "an element of suspicion",* concluded nevertheless (at 537-8):

> "We may disagree with the law of Mexico or Nevada establishing rules for residence. We may even disapprove them as expressing theories repugnant to our own standards, as applied to corresponding litigation initiated within this state. It does not follow that we should disturb a decree entered either in Nevada or Mexico if it complies with the requirements of their statutes, for we then say that the court had jurisdiction of the subject matter and the parties, and thus was competent to act."

Mr. Justice McCook was plainly in error. It is settled that parties may not, by consent, invest in a court jurisdiction over subject matter, where it is otherwise lacking.

He went further (at p. 538):

> "We are referred to no authority which would indicate a distinction between Mexico and Nevada with respect to issues like those raised by the pleadings of our action * * * ."

There are, however, compelling judicial reasons to differentiate between the decrees of sister states and foreign nations.

In the one case, the courts of this State are constitutionally obliged to give "full faith and credit." Article IV,

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* Presumably suspicion of a collusive agreement to alter the marriage, proscribed by § 51 of the Domestic Relations Law.

Section I, United States Constitution. Congress has required our courts to give the judicial decrees of sister states the same credit given them "by law and usage in the courts of the State from which they are taken." 28 U. S. C. § 687.

This constitutional measure of deference must be given irrespective of our State's views of public policy. This is the price of our Federal system, for the full faith and credit clause was intended to, and did, alter the status of the several States as independent sovereigns. *Williams* v. *North Carolina,* 317 U. S. 287, 295 (1945); *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 276-7 (1935).

On the other hand, the judgments of foreign nations "* * * must not contravene our public policy." *Martens* v. *Martens,* 284 N. Y. 363, 365 (1940); *Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375 (1955).

> "[T]he recognition of a foreign country judgment is far less certain, * * * far more assailable and vulnerable, than sister State judgments, and is subject to a test of public policy." *Rosenbaum* v. *Rosenbaum, supra,* 376.

Thus, contrary to Mr. Justice McCook's *ratio* in *Leviton,* that there is "no authority which would indicate a distinction between Mexico and Nevada with respect to the issues" presented here, it is plain that "there is * * * no significant basis for treating sister State and foreign country divorce judgments as identical in legal effect within this State." *Rosenbaum* v. *Rosenbaum, Ibid.*

As was explained by this Court in *Caldwell* (at 149-50):

> "We are commanded by the Constitution to give full faith and credit to the judgment of a sister State—a command which has no relation, of course, to foreign nation divorce decrees. Such a judgment has prima facie validity in our courts. The absent defendant spouse is customarily served in accordance with the requirements of procedural due process in the other State. Thus the decree is valid unless and until at-

tacked by collateral evidence that the plaintiff was not in fact domiciled in the sister State at the time of its rendition. *Prior to such collateral attack the judgment establishes a finding of actual residence of the successful party plaintiff for the requisite statutory period and also of the added mental ingredient necessary for the jurisdictional finding of domicile.* * * * " (Emphasis added.)

Compare the Mexican divorce here in issue. As the Trial Court determined (1796-7):

"Contrary to our concept of the marital res and jurisdiction predicated upon domicile, submission of the parties to the power of the court constituted the essence and the source of jurisdiction to grant a divorce in the State of Chihuahua. Domicile is superfluous. A marriage may be dissolved by mutual consent. * * * The domiciliary state's interest in the marital res upon which our law is based represents an alien concept to the law of the State of Chihuahua. * * *

"Consonant with the divorce law of the State of Chihuahua, it cannot be gainsaid that the Kaufmann divorce decree rests upon a jurisdictional recital which *need not* comprehend domicile; consonant with the undisputed facts of the Kaufmann divorce and the uncontroverted conclusions arising therefrom, it cannot be gainsaid that the Kaufmann divorce decree rests upon a jurisdictional recital which *does not* comprehend domicile."

The Court below also found authority for its ruling in the fact that "despite the continuing awareness of [the *Leviton* line of] decisions in the field of law and in the community, the Legislature has never sought to limit their doctrine" (1833).

The argument is curious as well as fallacious. It is apologetic and seems to betray a conviction that the *Leviton* case and those following it, as interpreted by the Court below, were wrongly decided.

It certainly pronounces an impermissible rule of statutory construction.

As was stated by Mr. Justice Douglas for the Supreme Court of the United States in *Girouard* v. *United States*, 328 U. S. 61, 69 (1946):

> "It is at best treacherous to find in [legislative] silence alone the adoption of a controlling rule of law."

In reexamining its own prior decisions, the Court stated (*Id.*):

> "We do not think * * * that we can properly place on the shoulders of Congress the burden of the Court's own error."

And in a concurring opinion in *Cleveland* v. *United States*, 329 U. S. 14, 23 (1946), Mr. Justice Rutledge stated:

> " * * * there may be a strong and proper tendency [underlying legislative silence] to trust to the courts to correct their own errors [citation omitted], as they ought to do when experience has confirmed or dictated the errors' existence."

The statements of the Court in *Girouard* and of Mr. Justice Rutledge in *Cleveland* are even more compelling here, for in those cases the Court was considering the inference to be drawn from the Legislature's failure to speak concerning the Court's prior construction of Congressional enactments. If no inference is to be drawn from the Legislature's failure to clarify the proper construction of its own enactments, how can it be said that the Legislature's failure to interject in an area traditionally left to the common law (*i.e.*, comity) is indicative of legislative approval of decisional law? *

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* On the contrary, is not the Legislature's refusal to change the divorce laws of this State and its recent reenactment of Section 51 (§ 5-311, General Obligations Law), evidence of its disconcern with the "problem" of respondent and others of her sympathy who would prefer to be free to divorce by consent?

At trial Mexican expert witnesses had testified that under the laws of the State of Chihuahua parties to a marriage may stipulate to dissolve their marriage. The court below found, and respondent does not contest that this is the law of Mexico. Until this Court is prepared to hold that New York domiciliaries may deprive this State of its vested interest in the family relationship of its domiciliaries and may, by agreement made in New York followed by a perfunctory appearance in the State of Chihuahua, dissolve their marriage by consent, it must reject the judgment of divorce relied upon by respondent in her defense.

(2) Petitioner's Brief in Support of Motion for Reargument and for Alternative Relief in the Court of Appeals

Pp. 4-5:

POINT I

REARGUMENT SHOULD BE GRANTED BECAUSE THE DECISION OF THIS COURT VIOLATES RIGHTS GUARANTEED APPELLANT BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In granting recognition to the "bi-lateral" Mexican divorce in issue, the majority of this Court held that respondent's first husband "carried with him legal incidents of the marriage itself, considered as an entity, which came before the [Mexican] court when he personally appeared and presented his petition" (16 N. Y. 2d 64, 72). In so holding, this Court, in effect, has converted marital actions between domiciliaries of this State into "simple transitory actions" thereby wresting from the Legislature of this State its exclusive right to regulate the domestic relations of its domiciliaries in violation of the Fourteenth Amendment. *Alton* v. *Alton,* 207 F. 2d 667 (3rd Cir., 1953), appeal vacated as moot, 347 U. S. 610 (1954); *Granville Smith* v. *Granville Smith,* 214 F. 2d 820 (3rd Cir., 1954), aff'd 349 U. S. 1 (1955).

Also, this Court's decision, which operates to make the validity of a Mexican divorce turn on the difference in cost between a postage stamp and an airline ticket to El Paso, Texas, operates to deprive our poorer citizens of the equal protection of laws guaranteed by the Fourteenth Amendment.

By its decision, this Court has also wrested from the Legislature its exclusive authority to regulate the domestic relationship of this State's domiciliaries, and has flatly repealed § 5-311 of the General Obligations Law which proscribes consensual divorces of the sort here in issue.

Point II

If Reargument Be Denied, the Remittitur of This Court Should Be Amended To Indicate That the Constitutional Questions Above Discussed Were Passed Upon on This Appeal.

In the event that this Court should deny plaintiff-appellant leave to reargue his appeal herein, it is respectfully requested that this Court amend its remittitur herein to add the following decretal paragraph:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: plaintiff-appellant contended that the order appealed from deprived him of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no such denial and that there was no merit to appellant's contention."